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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 20

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF OF APPELLEE RAILROAD COMPANIES

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BRIEF OF APPELLEE RAILROAD COMPANIES

QUESTION PRESENTED

In determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service, may the Commission take into consideration the existing railroad service in the area?

Appellants say: No.

Appellees say: Yes.

This is exclusively a question of law, the construction of § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307

(a), and of the National Transportation Policy, 49 U.S.C. preceding § 1.

No other question is before the Court. Appellants, p. 2, have not questioned the findings or the sufficiency of the evidence.

In the District Court the United States supported the Commission's order by answer (R. 42-44), brief, and oral argument. Hence the United States is not entitled to a review. Administrative Procedure Act § 10(a), 5 U.S.C. §1009(a)[1]; *Lee* v. *Civil Aeronautics Board*, C. A. D. C. Cir., 225 F. 2d 950, 951 (1955); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955); *Pan-Atlantic Steamship Corp.*, v. *Atlantic Coast Line Railroad Co.*, 353 U.S. 436 (1957).

Moreover, the United States has not "presented" any question for review. Administrative Procedure Act § 10(e), 5 U.S.C. § 1009(e)[2]; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, *supra* p. 500; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488 (1951).

We will take up these points more fully in our discussion of the United States brief in part 4 of our argument, p. 40.

[1] 10(a). Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

[2] 10(e). So far as necessary to decision and *where presented* the reviewing court shall decide * * *. (Emphasis added.)

STATEMENT OF THE CASE

We agree with appellants' statement, pp. 2-4.

Appellant Schaffer applied to the Commission for authority, in part, as a motor common carrier of granite from Vermont to sixteen midwestern states. No existing motor carrier performs this service. The railroads are now carrying all of the traffic. The Commission determined, after hearing, that the proposed motor carrier service is not required by the public convenience and necessity. 63 M.C.C. 247 (R. 24). Appellant American Trucking Associations, Inc., intervened in the proceedings before the Commission. Appellants sued in the District Court of South Dakota to annul the Commission's order, but that Court, after hearing, dismissed the complaint. 139 F. Supp. 444 (R. 359).

Appellee railroads opposed the application before the Commission (R. 25), were permitted to intervene in the District Court action pursuant to 28 U.S.C. § 2323 (R. 44), and filed an answer (R. 47) to appellants' complaint asking that it be dismissed.

The National Industrial Traffic League has filed a brief *amicus curiae* asking the Court to reverse the District Court.

SUMMARY OF ARGUMENT

1.

This case involves the construction of § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a), and of the National Transportation Policy of 1940, 49 U.S.C. preceding § 1. These statutes compel the Interstate Commerce Commission to take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service.

Ever since the enactment of the National Transportation Policy of 1940 the Commission has consistently construed these statutes in harmony with the statement in the preceding paragraph. The Transportation Act of 1940 repealed the declaration of policy in the Motor Carrier Act of 1935, and substituted for it the National Transportation Policy of 1940. The 1940 Policy was a substantial change from the 1935 policy. An argument can be made that prior to 1941 and under the 1935 policy the Commission's rule of decision was not in harmony, in respect to 49 U.S.C. § 307(a), with the statement in the first paragraph of this summary. But it is entirely clear that since the enactment of the 1940 Policy the Commission's rule of decision has been in harmony with such statement.

2.

The Supreme Court's decisions support the Commission's construction of these statutes. The Court holds that 49 U.S.C. § 307(a) affords protection of the economic interests of railroads in their competitive relations with motor carriers. The Court's decisions make it clear that this principle does not disappear where an applicant for motor carrier authority is proposing service to an area without

motor carrier service. Appellants are asking the Court to write into § 307(a) and the 1940 Policy a fixed limitation on the Commission's powers, to the effect that the Commission cannot take into consideration the existing railroad service in determining whether public convenience and necessity requires motor carrier service in an area without motor carrier service. It is plain that appellants' contention has no merit.

3.

Congress has shown by a course of legislation that the Commission's construction of the statutes is correct. When Congress wishes to vest complete discretion in an administrative body, without restrictions of the type contended for by appellants, it uses the language of 49 U.S.C. § 307(a). But when Congress wishes to limit the powers of the administrative agency, in the fashion for which appellants contend here, it places express limiting terms in the statutes.

This course is displayed in the legislative history of the Natural Gas Act. The original Act in 1938 gave jurisdiction to the Federal Power Commission to require proof of public convenience and necessity for building a pipeline only where the line would be competitive with an existing pipeline. The Federal Power Commission held that this excluded consideration by it of the interests of coal and railroad industries affected by a proposal subject to the Commission's jurisdiction. In 1942 Congress amended the Gas Act (1) for the express purpose of requiring proof of public convenience and necessity for the building of every pipeline, irrespective of whether there was another pipeline in the area, and (2) for the express purpose of requiring the Federal Power Commission to consider the economic interests of affected coal and railroad interests in every

such case. Congress accomplished this result, which it specifically intended, simply by writing the essential provisions of 49 U.S.C. § 307(a) into the Natural Gas Act.

The legislative histories of the freight forwarder act of 1942, and of the amendment to this act in 1957, show Congress at work writing variants of the ordinary public convenience and necessity clauses. The purposes of these variants were to impose restrictions on the power of the Interstate Commerce Commission in granting forwarder permits and to modify or remove such restrictions. This legislative history shows clearly that when Congress wants to limit an agency's granting or denial powers, in the fashion contended for by appellants, it does so expressly. This history shows clearly that Congress knows the meaning of the phrase "public convenience and necessity," knows how to impose restrictions on its exercise, and intends its administration by the agency be free from restrictions, such as appellants urge here, unless Congress imposes them.

4.

The United States supported the Commission's order in the District Court. Hence, by the terms of the Administrative Procedure Act § 10(a), the United States is not entitled to a review of the order.

Moreover, under § 10(e) of that Act the United States has not "presented" any question which can be reviewed. The United States repudiates the only "question presented" by the appellants and thus does not support appellants. The United States alleges that the "question presented" is that the Commission erred in denying Schaffer's application to furnish a motor carrier service that is superior to the railroad service. But neither the United States nor anyone else has even attempted to establish that the "whole record" before the Commission shows that Schaffer's proposed motor carrier service would be superior to the existing railroad service.

ARGUMENT

The statutes here involved compel the Commission to take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service.

The standards to be applied by the Commission in determining whether to grant appellant Schaffer's application are stated in § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a), hereafter § 307(a), and in the National Transportation Policy:

> 49 U.S.C. § 307(a). Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * * (Act of Aug. 9, 1935, 49 Stat. 551.)
>
> 49 U.S.C. preceding § 1. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competi-

> tive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Act of Sept. 18, 1940, 54 Stat. 899.)

The foundation requirement is a finding by the Commission that the proposed service "is or will be required by the present or future public convenience and necessity."

Appellants assert, p. 15, that the phrase "public convenience and necessity" in § 307(a) has tied to it the fixed implied condition that where there is no motor carrier service in an area, the Commission may not take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service. There are no statutory words anywhere that even suggest such a condition, but appellants are asking this Court to add it to the statute by construction. Appellants are plainly in error.

Our argument will proceed under the following general subdivisions: (1) The Commission has consistently held since 1940 that it may take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service. (2) The Supreme Court's decisions clearly support the Commission. (3) Congress has by legislation made it clear that the Commission's construction of the statutes here involved is correct. (4) Answer to the brief of the United States.

1.

THE COMMISSION'S CONSTRUCTION OF THE STATUTES

Ever since the enactment of the National Transportation Policy in 1940 the Commission has held that in determining whether public convenience and necessity requires motor carrier service in an area without motor carrier service it may take into consideration the railroad service in the area.

Appellants argue, pp. 7-14, that from 1935 to 1950 the Commission "has consistently recognized that the existence of adequate railroad service affords no basis for the denial of motor carrier operating authority." That contention is erroneous. While an argument may be made that this was the Commission's position from 1935 to 1941, it is clear that for the past fifteen years the Commission has held consistently that in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service it may take into account the existing railroad service. It holds that this course is required by the National Transportation Policy.

Thus in 1942 in *Bailey Common Carrier Application*, 33 M.C.C. 537, the Commission denied the application on the ground that existing railroad service was adequate, although there was no for-hire motor carrier service available to the shippers. Noting, p. 540, that the railroads urged that this disposition was required by the National Transportation Policy, the Commission said, pp. 541-542:

> "The record establishes that the shippers whom applicant proposes to serve either have bulk plants located on rail sidings or are providing their own transportation service to their bulk plants which are not located on rail sidings. While it appears that applicant might render the shippers a more convenient service than that presently available, there is no showing that

present rail service is so inadequate as to require a new operation to be instituted, or that those shippers now providing their own transportation service are unable to continue their operations. Although it appears that shipments transported by rail do not move as expeditiously as would those transported by applicant, there is no showing of any material damage resulting to any shipper by virtue of any failure by any rail carrier to provide more rapid service.

"In view of our conclusions herein, no discussion need be made respecting applicant's fitness, willingness, or ability to perform the operations under consideration.

"We find that applicant has failed to establish that public convenience and necessity require operation by applicant as a common carrier by motor vehicle, of petroleum products, in bulk, in tank trucks * * *."

Appellants say, pp. 14-15, ignoring the *Bailey* case, that *Kenosha Auto Transport Corp., Extension*, 52 M.C.C. 123, *decided in 1950*, is the *first* decision constituting "a complete about-face from its earlier decisions holding that the existence of adequate rail service furnishes no basis for denial of motor-carrier authority." But the *Kenosha* case shows on its face that appellants' statement is not correct. For in the *Kenosha* case the Commission said, 52 M.C.C. p. 127:

"We have in the past denied an application for authority to operate as a motor common carrier where only rail service was available for the movement of traffic, (see *Bailey, Common Carrier Application*, 33 M.C.C. 537) and deem the facts herein justify the same conclusion."

Pointing to the National Transportation Policy the Commission said, p. 126:

"* * * The national transportation policy, as set forth in the Interstate Commerce Act, charges us with the duty, among others, to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several car-

riers. This mandate negatives applicant's contention that it is entitled as a matter of law to a grant of the authority requested. The circumstances surrounding each proceeding are the criteria to which we must look. And examination of the facts of the instant proceeding discloses that there is a very substantial movement of these farm tractors by rail. Though shipper complains of some delays by rail service, we note no specific instances of any losses of sales occasioned by such delays, or any other serious consequences. In any transportation service reaching the proportion of the movement here involved, there are bound to be some unsatisfactory experiences regardless of the form of transportation service utilized. * * *"

In 1942 in *Worm Extension—Ainsworth and Johnstown, Nebr.*, 32 M.C.C. 641, the Commission denied a motor contract carrier application although no motor carrier service was available in part of the involved area, saying in part, p. 644:

"* * * Before we may grant the application herein, we must find that the proposed contract-carrier operation will be consistent with the public interest and the national transportation policy. The term 'consistent with the public interest' means not against or contradictory to the public interest, and it must be considered in connection with the national transportation policy of Congress, which places emphasis upon the maintenance of safe, adequate, economical, and efficient service, sound economic conditions in transportation, and the preservation of a national transportation system adequate to meet the needs of commerce."

Most of the cases cited by appellants on this point, pp. 8-10, were decided before 1941 (before the publication of 28 M.C.C.). Each of the cited cases decided since 1940 contains a qualification similar to that commented upon by appellants on page 14 of their brief, footnote 13. For example, in *Newton Extension*, 43 M.C.C. 787, 792 (1944),

the Commission said: "The evidence fairly established that the service offered by rail and motor carriers do not meet all of the demands of the shippers." And in *England Transp. Co. Extension*, 49 M.C.C. 567, 570 (1949), there was a specific finding that railroad service was inadequate. An examination of each of appellants' post-1940 cases discloses that the statement to the effect that every shipper is entitled to motor carrier service follows a specific finding as to real need for the service, or as to the inadequacy of railroad service, that makes the statement pure *dictum*.

In *Hayes Freight Lines, Inc., Extension*, 52 M.C.C. 303, 305 (1950), proposed motor carrier service was denied because there was "no proof that the present rail service * * * is in any manner inadequate." There have been other Commission decisions in accord with the instant case which are not published in full in the Commission's reports but which are filed and circulated in mimeograph copies commonly known as mimeograph reports.[3]

It is our view that the Commission's pre-1941 holding was not warranted, and it seems possible that this is now the Commission's view. Thus in *Hitchcock Common Carrier Application*, 54 M.C.C. 16, 19, (1952), the Commission said in denying an application to serve an area where only railroad service was available:

> "It is true that in numerous instances we have found the public entitled to a proposed motor service, despite the existence of rail service; but in all those instances,

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[3] For example, *Florida Tank Lines, Inc., Contract Carrier Application*, 64 M.C.C. 822 (1955); *Frozen Food Exp. Extension—Amarillo, Tex.*, 61 M.C.C. 812 (1953); *Pannell and Church Common Carrier Application*, 62 M.C.C. 837 (1954); *Consolidated Freightways, Inc., Extension—Tulalip*, 64 M.C.C. 816 (1955); *Bryson & Prevost Extension—Hagerstown, Ind.*, 53 M.C.C. 822 (1951); *Heller & Heller Extension—East Stroudsburg, Pa.*, 54 M.C.C. 817 (1952); *St. Mary's Truck Line, Inc., Extension—Granite City, Ill.*, 52 M.C.C. 822 (1951).

> we found that public convenience and necessity required the proposed service, basing such finding on all the facts of record, including the existence of rail service and the absence of motor service. We were not, as applicant seems to suggest, finding that, as a matter of law, an applicant should be authorized to perform a proposed service merely because no existing motor service has been shown. Each proceeding, resting upon its own merits, must include a consideration not only of these facts but also of all other pertinent facts, such as the quantity and quality of service actually available, the adequacy of that service for the reasonable and well-founded transportation requirements of the interested shippers and receivers, the possibility of obtaining service improvements, if needed, from existing carriers by reasonable efforts, and the possible effect of the proposed service upon existing carriers."

The motivation for the decisions in the pre-1941 cases was the Commission's construction of the original declaration of policy in the Motor Carrier Act of 1935, 49 Stat. 543 § 202(a). See the excerpt from *Bowles Common Carrier Application*, 1 M.C.C. 589, 591 (1937), citing § 202(a), which is quoted in appellants' brief, pp. 7-8. Appellants recognize this, for they also quote, pp. 10-11, part of the original declaration of policy, § 202(a), and say in respect to it, p. 11: "It was the quoted language [of § 202(a)] which furnished the basis for the statement in the *Bowles* case, *supra*, * * * and the ultimate conclusion that shippers and consignees are entitled to adequate service by motor vehicle as well as by rail."

This original declaration of policy in the Motor Carrier Act of 1935, § 202(a), was repealed by the Transportation Act of (Sept. 18) 1940. 54 Stat. 919-920 §§ 16, 17(a). The 1940 Act created the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1, and specifically provided for the substitution of the Policy for the repealed § 202(a). 54 Stat. 919-920 §§ 16, 17(a). (The 1940 Act also

designated the Motor Carrier Act of 1935 as Part II of the Interstate Commerce Act. 54 Stat. 919 § 15.)

Thereafter the Commission, taking note of the 1940 Policy declaration, changed its rule of decision that had been based on former § 202(a) and conformed its holdings to the new National Transportation Policy. See *Bailey Common Carrier Application*, 33 M.C.C. 537 (1942), *Worm Extension*, 32 M.C.C. 641 (1942), and other cases cited above.

Appellants are in error when they assert, p. 11, that the National Transportation Policy of 1940 is but a continuation of the original declaration of policy in § 202(a) of the 1935 Act. The 1940 Act announced a new Policy.

The declaration of policy in the "Motor Carrier Act, 1935" was the following, 49 Stat. 543:

> "Sec. 202(a). It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

Comparison of the above 1935 policy declaration with the 1940 Policy which was substituted for it, p. 7 above, 54 Stat. 919-920 §§ 16, 17(a), makes their differences apparent. The repealed § 202(a) was plainly slanted to foster motor

carrier transportation. Reference to "other carriers" occurs only once and is only incidental to the main purposes of the section. In contrast, the 1940 Policy provides equality of regulation without any slant toward any form of transportation.

The Senate Committee on Interstate and Foreign Commerce, reporting the Transportation Act of 1940 for passage, S. 2009, said in part in discussing the proposed National Transportation Policy, Senate Report No. 433, pp. 2-3, 76th Cong., 1st Sess. (Serial vol. 10293):

> "As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads, the railroads had a monopoly on transportation. In later years competing forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. The railroads at first refused to treat these competing forms of transportation, particularly by motor, seriously, and it was not until after much of their traffic and many of their passengers had been lured away that the railroads took drastic steps to recover the lost business. The sum and substance of the matter is that at the present time there is a plethora of transportation facilities, and under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein. S. 2009 seeks to do this."

The Court noted the National Transportation Policy as a new development in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 66 (1945), saying:

> "The National Transportation Policy has recently been authoritatively summarized by Congress. That declaration requires administration so as to preserve the inherent advantages of each method of transportation, and to promote 'safe, adequate, economical and

> efficient service.' Such broad generalizations, while well expressing the Congressional purpose, must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interest in the different types of carriers with due regard to the declared purposes of Congress."

That statement is highly significant because of the practical application made of it in the *Parker* case, in construing the relationship of the 1940 Policy and 49 U.S.C. § 307(a). We deal with the point fully in the following section of our brief.

2.

THE SUPREME COURT'S CONSTRUCTION OF THE STATUTES

The Supreme Court's construction of the statutes sustains the Commission's construction.

The Court has construed 49 U.S.C. § 307(a) and the National Transportation Policy in several cases. The Court's uniform construction clearly sustains the Commission's construction.

Alton Railroad Co. v. *United States,* 315 U.S. 15, 18-20 (1942), held that a railroad is a "party in interest" who may sue to set aside an order granting "grandfather" motor carrier authority under 49 U.S.C. § 306(a). *Chicago, St. P. M. & O. Ry. Co.* v. *United States,* D.C. Minn., 50 F. Supp. 249 (1943), affirmed in *Chicago St. P. M. & O. Ry* v. *United States,* 322 U.S. 1 (1944), held that the railroads' "party in interest" status was equal and indistinguishable in 49 U.S.C. §§ 306(a) and 307(a).

In the *Alton* case the railroads were held to satisfy the "party in interest" test because one purpose of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301 *et seq.*, was to protect their economic interests in competition with motor carriers. That should be kept clearly in mind. It is made entirely clear by the Court, 315 U.S. pp. 19-20:

> "They [the railroads] clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of [applicant] Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry —competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong. 2d Sess. pp. 13-27. They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong. 1st Sess.; H.

> Rep. No. 1645, 74th Cong. 1st Sess. Hence they are parties in interest within the meaning of § 205(h) under the tests announced in *Texas & P.R.Co.* v. *Gulf, C. & S. F. R. Co.*, 270 US 266; *Western P. California R. Co.* v. *Southern P. Co.*, 284 US 47; and *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 US 382, *supra*."

The cases cited in the foregoing excerpt have a highly significant import. All had to do solely with protection of competitive economic interests through regulation under the Interstate Commerce Act. The first two involved competitive economic interests of railroad against railroad. The third was between a railroad ferry subject to the Interstate Commerce Act and a water carrier not subject to the Act but whose competitive economic interests, nevertheless, were held subject to protection under the Act because its operations were competitive with operations subject to the Act. Thus in the *Alton* case the Court very properly construed the Motor Carrier Act, now Part II, as affording between railroads and motor carriers the same type of protection of competitive economic interests that was provided under Part I of the Act.

It is plain that that economic interest and the protection afforded it by Part II of the Act extend all the way through a proceeding under § 307(a), from the hearing before the Examiner to the review in the Supreme Court. "The legislation aimed at a whole embraces all its parts." *United States* v. *Darby*, 312 U.S. 100, 123 (1941).

The economic interest so protected is a very broad one. The idea that that broad economic interest becomes nonexistent because there is no present motor carrier service in the area covered by an application for new motor carrier authority is not compatible with the sweeping ground of decision of the *Alton* case nor with the authorities it cites. It is impossible to attribute to the *Alton* decision the hidden qualification that its principle does not apply where rail-

roads are opposing the application for the first motor carrier service in an area.

Appellants contend for a construction of § 307(a) and of the National Transportation Policy that would require writing into those acts a fixed condition binding upon the Commission in all cases. The Court has refused to engraft on these statutes specific and binding limitations of this type.

Thus *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), involved a Commission order under § 307(a) authorizing service by a railroad controlled motor carrier. Independent motor carriers serving the area asked the Court to hold that the National Transportation Policy and § 307(a) contained implied limitations that precluded such grant of authority where existing independent motor carriers were ready, willing, and able to render the proposed service. The Court held that the Commission's broad powers could not be so limited, saying, 326 U.S. pp. 65, 73:

> "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. * * * This, of course, gives administrative discretion to the Commission * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."
>
> * * * * *
>
> "The alternative to the existence of this discretion is that the language of the Interstate Commerce Act, part II, forbids the granting to railroads of a certificate of convenience and necessity for the operation of motor trucks, under specially limited certificates, when there are certificated motor carriers, independent of railroad authority or supervision, with whom arrangements for the service might be made by the rail carriers. *There is no such prohibition in terms. Any such implication is negated by the discretion to grant certificates*

conferred on the Commission by the Act." (Emphasis added)

Similarly, in the instant case the implication which appellants are asking the Court to write into § 307(a) and the Policy "is negated by the discretion to" *deny* "certificates conferred on the Commission by the Act," in determining public convenience and necessity. The phrase in § 307(a) "otherwise such application shall be denied," confers discretion to deny equal to the discretion to grant.

In *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953) a cognate question was presented, whether the Commission's statutory powers were broad enough to authorize the making of trip-leasing regulations. Holding that the power existed despite the absence of express terms authorizing it, the Court said, p. 310:

> "* * * Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States* v. *Pennsylvania R. Co.* 323 US 612. * * *"

In *United States* v. *Pennsylvania Railroad Co.*, 323 US 612 (1945), cited in the above excerpt, the Court held that lack of specific statutory authority did not render invalid a Commission order requiring railroads to deliver their cars to a water carrier in through transportation. These two cases illustrate the principle that the broad powers which Congress has vested in the Commission are not to be whittled away by imposing judicial restrictions upon them.

Maintenance of Competition

Appellants, pp. 16-20, present an argument under the heading, "Maintenance of Competition." The legal aspects

of much this argument are answered by *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). Citing the Interstate Commerce Act and decisions construing it the Court said, p. 95:

> "To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress. And since we read the opinion of the Commission as saying precisely that, we think the case must be remanded for its reconsideration. * * *"

As a part of their argument on competition appellants say, p. 20, citing a few statistics: "* * * one is constrained to wonder why the Commission felt these railroad giants needed to be protected from the competition of a relatively insignificant operator such as Schaffer." Two answers, legal and statistical, are the following.

Regulation under the Interstate Commerce Act comprises, among other things, the regulation of *all* motor carriers and *all* railroads considered as a mass; it is concerned with the total impact of all motor carriers upon all railroads. Such regulation cannot ignore or minimize any carrier, no matter how small, since his relation to the whole mass makes him important. Two characteristic statements of this principle are the following:

United States v. *Darby*, 312 U.S. 100, 123 (1941):

> "Congress * * * recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. * * * The legislation aimed at a whole embraces all its parts."

Wickard v. *Filburn*, 317 U.S. 111, 127-128 (1942):

> "That appellee's own contribution to the demand

for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

The Commission may have had in mind, in addition to the figures cited by appellants, p. 20, that the motor carrier industry is huge and growing and that certain unbalanced developments in respect to comparative revenues and ton-miles of railroads and motor carriers may be cause for concern.[4] For example, in 1955 motor carrier revenues

[4] TRENDS IN REVENUES AND TON-MILES

RAILROADS AND MOTOR CARRIERS REPORTING TO I.C.C.

	OPERATING REVENUES			TON-MILES		
	1	2	3	4	5	6
Year	Railroads (000,000)	Motor Carriers (000,000)	Ratio of Col. 2 to Col. 1 (per cent)	Railroads (000,000)	Motor Carriers (000,000)	Ratio of Col. 5 to Col. 4 (per cent)
1939	$3,297	$ 792	24.02	335 375	19 646	5.86
1940	3,584	867	24.19	375 369	20 683	5.51
1941	4,510	1,096	24.30	477 576	26 835	5.62
1942	6,026	1,213	20.13	640 992	28 083	4.38
1943	6,866	1,305	19.01	730 132	28 768	3.94
1944	7,087	1,352	19.08	740 586	27 252	3.68
1945	6,617	1,406	21.25	684 148	27 289	3.99
1946	5,866	1,655	28.21	594 943	30 448	5.12
1947	7,141	2,214	31.00	657 878	37 693	5.73
1948	8,090	2,698	33.35	641 104	46 706	7.29
1949	7,151	2,911	40.71	529 111	47 891	9.05
1950	7,934	3,737	47.10	591 550	65 648	11.10
1951	8,758	4,169	47.60	649 831	72 292	11.12
1952	8,915	4,418	49.56	617 942	70 843	11.46
1953	9,078	4,926	54.26	608 964	76 510	12.56
1954	7,915	4,737	59.85	552 197	69 392	12.57
1955	8,665	p 5,535	63.88	626 892	p 75 119	11.98

p = preliminary

SOURCE:

Columns 1 and 4 from "Transport Statistics in the United States, Part I, 1955", table 155, page 116, published by the Interstate Commerce Commission.

Column 2, years 1939 through 1950, from I.C.C. Statement No. 531, table 1, column c, page 4, entitled "Class I, II and III Motor Carrier Revenues—Ton Miles and Passenger Miles, 1939-51". Years 1951 through 1955 from "Transport Economics, October, 1956", page 8, published by the Interstate Commerce Commission.

Column 5, years 1939 through 1950, from I.C.C. Statement No. 531, table 3, column c, page 10, entitled "Class I, II and III Motor Carrier Revenues—Ton Miles and Passenger Miles, 1939-51". Years 1951 through 1955 from "Transport Economics, October, 1956", page 10, published by the Interstate Commerce Commission.

were 63.88 per cent of railroad revenues, while motor carrier ton-miles were but 12.98 per cent of railroad ton-miles.

No Inference from Legislation Proposed But Not Enacted

The argument is made by appellants, pp. 12-13, and by the National Industrial Traffic League, pp. 9-10, that certain bills introduced in Congress but not reported by Committees are evidence of Congressional intent. Appellants and the League are in error. Such legislative activity casts no light on the intent of Congress, *United States* v. *Turley*, 352 U.S. 407, 415, footnote 14 (1957); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950); *New York* v. *Saper*, 336 U.S. 328, 338-340 (1949); and cannot be construed as an admission by an agency proposing such legislation of the construction to be placed on a statute, *Wong Yang Sung* v. *McGrath*, *supra*.

The District Court Understood and Disposed of the Issues

In pages 23-25 appellants discuss what they call "The District Court's fundamental error." The three sentences from the Court's opinion cited at the top of page 24 are plucked out of context and plainly do not represent the Court's holding. The Court's opinion (R. 359-369), read as a whole, shows clearly that the Court decided the two issues before it: (1) whether the Commission had statutory authority to consider the existing railroad service in determining whether to grant the Schaffer application, and (2) whether the evidence sustains the Commission's findings. It answered both of these questions in the affirmative. The language quoted at the top of page 24 of appellants' brief must be read in connection with the whole opinion, since the Court was there speaking in generalities.

Appellants' Factual Arguments

Appellants argue various factual matters in pages 21-30. These have no bearing upon the single question of law that appellants present, p. 2. They pertain solely to various questions of fact to be considered by the Commission in determining public convenience and necessity. Moreover, appellants give a large record an exceedingly fragmentary and gingerly treatment. For example, the representative of the Rock of Ages Corporation testified that if Schaffer published a tariff with a higher rate level than the less carload rail rate his company would not give Schaffer its business (R. 261). The witness thus made it clear that his interest was primarily the rate level and not the service factor. There is a great deal more evidence of this character which would have to be considered in determining factual issues which appellants mention but which they do not try to support by citation of evidence. On page 25 appellants present an argument under the heading "Preservation of Inherent Advantages of Motor Carrier Service." Again that is an issue committed to the Commission and decided by it upon a large record which appellants have not attempted to brief.

3.

THE CONSTRUCTION OF THE STATUTES BY CONGRESS

Congress has by legislation made it clear that the Commission's construction of the statutes here involved is correct.

Congress has used in several statutes the language of § 307(a), "public convenience and necessity". Congress has used in other public service statutes very meaningful variants of that phrase. Congress has placed express limitations upon agency power and has removed express limita-

tions. By all of this legislative action Congress has clearly demonstrated two general principles:

(1) When Congress intends to give the administrative agency full administrative discretion, without any implied limiting conditions such as appellants urge here, it uses the phrase of § 307(a), "public convenience and necessity".

(2) But when Congress wishes to attach some special condition to the granting power of an administrative agency, such as appellants urge here, Congress does so in express terms without leaving to implications any important limitations on the agency's granting power.

Congress has in this field displayed wakeful legislative activity and discernment over the years. If the Court were to agree with appellants it would mean that the Court would be joining with Congress in legislative activities that Congress has clearly staked out as lying strictly within its own legislative competence. We will now examine the course of this legislation.

Congress has used the phrase "public convenience and necessity" as the standard for the grant of new authority in the following public services: railroads in 1920[5]; radio broadcasting in 1927[6], reenacted in same words in 1934[7]; telegraph and telephone in 1934[8]; motor carriers in 1935; air carriers in 1938[9]; and water carriers in 1940[10]. *For texts of these acts see Appendix hereto.*

The phraseology of the "public convenience and necessity" clauses of all of these statutes is substantially identical, and the Court has cited its decisions construing the

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[5] Act of Feb. 28, 1920, 41 Stat. 477, 49 U.S.C. § 1(18).
[6] Act of Feb. 23, 1927, 44 Stat. 1162, 1166 §9.
[7] Act of June 19, 1934, 48 Stat. 1083, 47 U.S.C. § 307(a).
[8] Act of June 19, 1934, 48 Stat. 1075, 47 U.S.C. § 214(a).
[9] Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. § 481(d)(1).
[10] Act of Sept. 18, 1940, 54 Stat. 941, 49 U.S.C. § 909(c).

clause in one statute as authority for the construction of the clause in another statute.[11]

THE NATURAL GAS ACT

But in 1938, in the Natural Gas Act, June 21, 1938, 52 Stat. 821, 15 U.S.C. §§ 717 *et seq.*, Congress departed from its former use of the phrase "public convenience and necessity" and provided standards for the grant of public service authority different from the standards set up in the earlier statutes. After a few years of experience this Act was amended Feb. 7, 1942, 56 Stat. 83. The original act, the amendment, and the legaslative history show clearly what Congress intends by "public convenience and necessity". It may be noted that the Natural Gas Act was passed by the same Congress that enacted the Civil Aeronautics Act of June 23, 1938. This latter act, as has been pointed out, employed the regular "public convenience and necessity" standard.

The Natural Gas Act, as originally passed in 1938, contained the following section, 52 Stat. 825:

> "7(c). No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market *in which natural gas is already being served by another natural-gas company*, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof; *Provided, however*, That a natural-gas company al-

[11] *Federal Communications Comm.* v. *R.C.A. Communications, Inc.*, 346 U.S. 86, 90, 92, 94, 96 (1953); *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65, 66, 68, 69, 72 (1945).

> ready serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. * * *" (Emphasis added).

It will be noted that this provision differed from the other statutes above cited in that a natural gas company did not need to obtain authority to serve a market that had no natural gas service. An application for authority was required only for proposed service "to a market in which natural gas is already being served by another natural gas company".

In the first application proceeding under this section the Federal Power Commission held that coal, railroad, and labor interests that would be affected by the construction of a natural gas pipeline had no standing to intervene in opposition and that the Commission could not consider such interests in determining issues of public convenience and necessity. *Matter of Kansas Pipe Line and Gas Co.*, 2 F.P.C. 29 (1939). While the Commission permitted various natural gas companies to intervene in opposition, p. 32, it denied intervention to the coal, railroad and labor interests, p. 32, and it said in part, p. 57:

> "The coal, labor, and railroad interests who have participated in these proceedings have urged that we consider the adverse effects upon their interests of the certification of these proposed pipe lines. We have already noted that section 7(c) of the Natural Gas Act does not give us unlimited jurisdiction over all proposed construction of facilities for the transportation of natural gas but that our jurisdiction attaches only when proposed construction is of facilities *for the transportation of natural gas to a market in which natural gas is already being served by another natural gas company.* In the light of that restriction on our jurisdiction and having regard to all other provisions of the Natural Gas Act, it would appear that Congress

did not intend this Commission generally to weigh the broad social and economic effects of the use of various fuels." (Emphasis is Commission's)

To change the effect of that holding was one of the principal purposes of the amendment of Feb. 7, 1942, to the Natural Gas Act, 56 Stat. 83. Taking note of the Commission's decision, Congress amended the Act for the express purposes, among others, to give to competing coal, railroad, and labor interests the status of parties in interest, and to require the Commission to consider such interests in determining public convenience and necessity. Congress accomplished that by repealing the original § 7(c), of the Natural Gas Act, 52 Stat. 825, and by substituting therefor the present subsections (c) to (g), inclusive, of 15 U.S.C. § 717 f. See 56 Stat. 83.

The proposed amendment, now 15 U.S.C. § 717 f (c) to (g), was set out in full in the report of the House Committee on Interstate and Foreign Commerce recommending the legislation, Oct. 21, 1941. House Report No. 1290, p. 4, 77th Cong., 1st Sess. (Serial vol. 10557). It was enacted exactly as proposed and became effective Feb. 7, 1942. The purpose of the amendment was stated as follows in the Report, pp. 2-3:

"The bill, if enacted, will amend section 7(c) of the Natural Gas Act, which at present requires a natural-gas company to obtain from the Federal Power Commission a certificate of public convenience and necessity only for construction or extension of facilities or extension of service 'to a market in which natural gas is already being served by another natural-gas company,' so as to require that a certificate be obtained in all cases as a condition precedent to the engaging in transportation or sale of natural gas subject to jurisdiction of the Commission, or to undertaking construction or extension of facilities. * * *"

"7(c) of the Natural Gas Act, as at present in force,

has proved unsatisfactory not only from the standpoint of administration by the Commission, but also the natural-gas companies themselves, as well as to the producers of competing fuels and the operators of competitive methods of transportation whose economic interests may be affected by the construction or extension of natural-gas pipe lines. * * * The limitation, moreover, to cases of extensions involving competition with another natural-gas company in a market already being served, has been held by the Commission to have the effect of excluding from consideration the interests of producers of competing fuels and competitive methods of transportation.

* * * * *

"The bill, as amended, eliminates the objections to the present section 7(c) above mentioned. By this legislation, the present jurisdictional disputes are eliminated, and the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation interests. * * *".

Subsection (e) of the amendment, 15 U.S.C. § 717 f (e), is the following:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certifi-

cate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The language used in the foregoing subsection (e), except the last sentence, is substantially that of 49 U.S.C. § 307(a), p. 7 above, construction of which is involved here. While there is close harmony of substance among the terms of all of the "public convenience and necessity" statutes, see Appendix, the order of the phrases in 49 U.S.C. § 307(a) differs from the order of the phrases of the other statutes; and subsection (e) of the 1942 amendment to the Natural Gas Act follows identically the phrasing of § 307(a) instead of the phrasing of the other acts. Also, subsections (c) and (d) of the Gas Act amendment follow closely and are obviously modeled upon 49 U.S.C. § 306(a)(1) and (b). The language of the 1942 amendment is undeniably that of the application and certificate provisions relating to motor common carriers.

It is to be noted that two effects of the 1942 amendment were: (1) to require an application for a certificate of public convenience and necessity to serve an area *not* having natural gas service, and (2) to require consideration of the interests of competitive fuel and transportation services in determining public convenience and necessity in such a case. These two new features, previously lacking, were brought into the Act together by the amendment. *The Committee Report stated that these results would be accomplished by incorporating in the Natural Gas Act the language of the "public convenience and necessity" provisions governing motor common carriers.* No other language than that of 49 U.S.C. § 307(a) was needed, in the opinion of Congress, to accomplish these results.

The 1942 Amendment has been given due effect by the courts. Thus it is held that in a proper case, the Federal

Power Commission would have power under the amendment to deny an application for construction of a natural gas pipeline to serve an area *not* having natural gas service upon consideration of the interests of competing coal and railroad industries. *National Coal Association* v. *Federal Power Commission*, C.A.D.C. Cir., 191 F. 2d 462, 465, 466 (1951). This Court commented briefly on the effect of the 1942 amendment in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 617 (1944), a rate case, in distinguishing between the powers possessed by the Commission in rate and certificate cases, saying, p. 617:

> "The Act of February 7, 1942, by broadening § 7 gave the Commission some additional authority to deal with the conservation aspects of the problem."

The construction of the 1942 amendment arising from the Report of the House Committee and from the enactment of the legislation proposed by the report is a Congressional construction of the meaning of 49 U.S.C. § 307(a). *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 276-277 (1942); *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 329-330 (1942). It is a construction that in a proper case under § 307(a) the Commission has power to deny an application for motor carrier authority to serve an area *not* having motor carrier service upon the ground that public convenience and necessity does not require such service, and that one of the factors of public convenience and necessity is the existing railroad service. *Great Northern Railway* and *Sioux Tribe* cases, *supra*. In each of those cases a committee report upon proposed legislation which was enacted was held to be controlling on the construction of an earlier cognate act.

An element of difference may be noted here between the application of "public convenience and necessity" in the Natural Gas Act and in the motor carrier statutes.

Under the Gas Act the Federal Power Commission must consider the economic interests of industries over which it has no jurisdiction, such as coal, railroads, water carriers,[12] and labor organizations. Assuredly the Interstate Commerce Commission, having jurisdiction over both motor and rail carriers, has even wider administrative power and discretion in respect to their competitive relationships than that possessed by the Power Commission in respect to competitive interests of parties over whom it has no jurisdiction. *Alton Railroad Co. v. United States*, 315 U.S. 15, 19-20 (1942), *supra*.

THE FREIGHT FORWARDER ACT

Further illumination of the question in this case is afforded by the act of 1942 regulating freight forwarders, its amendment in 1957, and the legislative histories of the two enactments. Act of May 16, 1942, 56 Stat. 284, 49 U.S.C. §§ 1001 *et seq.*, known as Part IV of the Interstate Commerce Act. Act of August 28, 1957, 71 Stat. 452, amending § 410(d) of the Interstate Commerce Act, 49 U.S.C. § 1010(d).

The same Committee of the House of Representatives that on Oct. 21, 1941, submitted its report on the amendment to the Natural Gas Act, p. 28 above, submitted on August 13, 1941, its report on the proposed legislation that became the Freight Forwarder Act, House Report No. 1172, 77th Cong., 1st Sess. (Serial vol. 10557). The bill under consideration, S. 210, as passed by the Senate required freight forwarders to obtain certificates of public convenience and necessity. The Senate Committee in reporting the bill, March 20, 1941, had stated that in this respect "Its provisions are substantially the same as those

[12] *City of Pittsburgh* v. *Federal Power Commission*, C.A.D.C. Cir., 237 F. 2d 741, 753-754 (1956).

applying to rail, motor, and water carriers." Senate Report No. 132, p. 6, 77th Cong., 1st Sess. (Serial vol. 10543). The House Committee struck all of S. 210, substituted language of its own, and explained the differences between the original S. 210 and the House Committee's proposed substitute, in respect to obtaining authority to operate, as follows, H. Rep. 1172, p. 22, 77th Cong., 1st Sess. (Serial vol. 10557):

> "S. 210, in section 407, requires the obtaining from the Commission of certificates of public convenience and necessity and recognizes 'grandfather rights' with respect to freight forwarders in operation on July 20, 1947. The committee substitute, in section 410, contains no provision with respect to 'grandfather rights' and instead of providing for certificates of public convenience and necessity requires freight forwarders to obtain permits which are to be issued without the requirement of a showing of public convenience and necessity. The applicant must establish, however, that it is ready, able and willing to perform the service proposed, and that the proposed service is or will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act.
>
> "The Committee substitute provides that permits may not be denied solely on the ground that the proposed service will be in competition with services performed by another freight forwarder. S. 210 contains no such provision.
>
> "The Committee substitute prohibits the issuance of a permit to a common carrier subject to part I, II, or III; but provides that no application for a permit shall be denied to a corporation affiliated with a common carrier subject to part I, II, or III, because of the relationship between such corporation and such common carrier. S. 210 is silent on the right of a carrier to obtain a certificate as a freight forwarder."

The House Committee's substitute section 410, above de-

scribed, was reported in full in House Report No. 2066, pp. 9-10, 77th Cong., 2nd Sess. (Serial vol. 10663), conference Report to accompany S. 210, May 4, 1942, and was enacted exactly as reported. 56 Stat. pp. 291-292, 49 U.S.C.A. §1010(a) to (d), 1951 ed.

Subdivisions (c) and (d) of § 1010 as originally enacted in 1942 were the following:

> "(c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing to properly perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. * * *"
>
> "(d) The Commission shall not deny authority to engage in the whole or any part of the proposed service covered by any application made under this section solely on the ground that such service will be in competition with the service subject to this chapter performed by any other freight forwarder or freight forwarders."

It seems plausible that the change from the Senate to the House version was occasioned by the views expressed in a letter from the Chairman of the Interstate Commerce Commission to the House Committee. This letter opposed requiring proof of public convenience and necessity for

forwarder operation and suggested some lesser measure of control.[13]

It will be seen that subsection (d) attached as a condition to the Commission's power in respect to forwarder permits that a permit could not be denied

> "on the ground that such service will be in competition with the service subject to this chapter performed by any other freight forwarder or forwarders."

This provision was approved by the same House Committee of the 77th Congress, 1st Session, that approved the 1942 amendment to the Natural Gas Act, p. 29 above. The two acts and the two reports show a clear understanding of what the Committee intended. The Amendment to the Gas Act markedly tightened up entry into service by requiring proof of public convenience and necessity as to areas without natural gas service. And the Gas Act amend-

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[13] Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 77th Cong., 1st Sess., on H.R. 3684, March 11-26, 1941. This was the House counterpart of original S. 210. See House Report No. 1172, p. 5, 77th Cong., 1st Sess., Aug. 13, 1941, on S. 210 (Serial vol. 10557). The letter, dated Mar. 12, 1941, stated in part in respect to the proposed requirement, Hearings p. 134:

> "We recommend that this entire section be stricken. Its administration will be a source of great difficulty and confusion to all concerned, and we do not believe that the public interest will be adversely affected if this is avoided. A forwarder may operate only over routes and may serve only points operated over and served by common carriers subject to the Act. The public convenience and necessity as to such routes and as to service at such points has been, and as to new services must be, determined with reference to the carriers actually performing the transportation. As to a forwarder which merely utilizes existing facilities that would be available to the shipper in any event, no determination of public convenience and necessity is necessary.
>
> "* * * Some of the Commissioners believe that while the issuance of certificates of public convenience and necessity to forwarders should not be authorized, some measure of control over the right to engage in such business insofar as interstate commerce is concerned should be exercised."

ment, by the adoption of the provisions of 49 U.S.C. § 307(a) regulating motor carriers, further required the Federal Power Commission to consider the interests of and service being rendered by competitive industries. On the other hand the forwarder act omitted the "public convenience and necessity" requirement first proposed, and forbade denial of a permit solely because one or more other forwarders were in service in the area.

These clearly expressed legislative actions demonstrate a complete awareness by Congress of methods of granting and conditioning administrative power and discretion, and of the intention to use such methods. They disclose express intention by Congress to vest certain powers in administrative agencies and express intention to limit agency powers when deemed necessary. Appellants are asking the Court to intrude into this legislative field by imposing on § 307(a) of Title 49 exactly the type of condition that Congress has dealt with in these various acts regulating interstate commerce pursuant to its powers under the Commerce Clause. Assuredly that is Congress' field and not the Court's.

Amendment of 1957 to Freight Forwarder Act

By the Act of August 28, 1957, 71 Stat. 452, subsection (d) of § 1010 of Title 49, was amended in material fashion that further evidences Congress' preoccupation with this field of legislation and thus the exclusion of judicial amendment in the field. Subsection (d) as originally enacted was in such broad terms that it gave the Commission little, if any, exclusionary power. This liberal entry provision was of course in harmony with the recommendations in the Commission's letter to the Committee described above, p. 34. However, experience proved the need for tightening the Commission's exclusionary powers. The subject is explained in the following excerpts from the Report of the Senate Committee on Interstate and Foreign Commerce, Senate Report No. 542, p. 2, 85th Cong., 1st Sess., June 27, 1957, to accompany S. 1383. The bill so recommended for

passage was enacted by Congress without change.

"Section 410 of the Interstate Commerce Act provides that no person may engage in service as a freight forwarder subject to the act without first obtaining from the Interstate Commerce Commission a permit authorizing such service. The standards that must be met, and the proof that must be made by an applicant for a freight-forwarder permit are set forth in the section.

"Subsection (d) of Section 410 contains a restriction on the Commission's powers to deny an application for a freight-forwarder permit. It provides that the Commission shall not deny authority to engage in freight-forwarder service solely on the ground that such proposed service will be in competition with the service subject to part IV of the act performed by any other freight forwarder or freight forwarders.

"In the administration of other parts of the act the consideration most frequently weighed by the Commission, in determining whether a new carrier service will be consistent with the public interest, is its probable effect upon existing carriers. The Commission repeatedly has stated that the maintenance of sound economic conditions in transportation would be jeopardized by allowing new operators to enter a field in competition with existing carriers who are furnishing adequate, efficient, and economical service. (*See Lifschultz, Extension*, 265 I.C.C. 431, 439 (1948). Being prohibited from taking this vital factor of competition into consideration in passing upon applications for freight-forwarder permits, the Commission has felt compelled to grant permits with great liberality. This has resulted in overcrowding the forwarder field and ultimately the ill effects will be felt by the general public which depends upon freight-forwarder services.

"The bill, as reported, differs from S. 1383 as introduced. S. 1383, as introduced, would not only have eliminated subsection (d) of section 410, but would have changed other standards for granting freight forwarder operating rights. It would have required the obtaining of certificates of public convenience and ne-

cessity, in lieu of permits, to engage in freight-forwarder service.

"While there is no doubt merit to the proposal as recommended by the Commission, the most glaring defect in the law that has been directed to the attention of the committee is the prohibition against considering competition in passing upon applications for forwarder permits. Accordingly, the bill as reported amends only subsection (d) of section 410 of the act.

"The amended bill does not eliminate subsection (d) of section 410, but adds language which will make that subsection pertinent only in the case of applications for freight-forwarder permits made by corporations controlled by common carriers subject to part I of the act. This will have the effect of maintaining the status quo with respect to any application to institute freight forwarder service by a railroad-controlled corporation, but will remove the limitations on the Commission's powers imposed by section 410 (d) insofar as all other applications are concerned.

* * * * *

"It has long been recognized that in order to maintain sound economic conditions in transportation, and to insure adequate, efficient, and economical service for the public, the Interstate Commerce Commission must have effective control over the number of entrants and extent of service in any given field of transport. As early as the Transportation Act of 1920, it was provided, in section 1 (18) of the Act, that no carrier by railroad shall undertake any extension of its line or construct a new line of railroad unless there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require it. The same pattern of controls was extended to common carriers by motor and water when they were brought under regulation.

"Under the above-mentioned provisions of the act, the Commission has regularly and frequently denied applications for new or additional operating authority upon the grounds that the service of existing carriers was adequate to meet all reasonable requirements of the shipping public, and that the institution of addi-

tional service would result in needless and uneconomic duplication of existing facilities."

The bill so recommended and passed, the new § 410(d) of the Interstate Commerce Act, 49 U.S.C. § 1010(d), is the following, 71 Stat. 452, the only change in old § 1010(d) being shown in italics:

> "(d) The Commission shall not deny authority to engage in the whole or any part of the proposed service covered by any application made under this section *by a corporation controlled by, or under common control with, a common carrier subject to part I of this Act* solely on the ground that such service will be in competition with the service subject to this part performed by any other freight forwarder or freight forwarders." (Emphasis added).

The amendment changed the statute so as to permit the Commission to take into consideration existing forwarder service in determining whether there is public need for additional new forwarder service, subject, however, to one exception. In passing upon an application of a railroad controlled forwarder for new authority the Commission cannot take into account the existing forwarder service. Appellants are asking the Court to legislate in such fashion as to give a different kind of twist to 49 U.S.C. § 307(a), but a twist, nevertheless, that only Congress has power to give.

The foregoing Committee Report emphasizes again that in a field where Congress is regularly and understandingly exerting its legislative policies, the Court should not interpose any amendments by judicial construction. If the Court were to construe § 307(a) of Title 49 as appellants advocate, the Court would be entering into legislative deliberations of exactly the type portrayed in the Committee's Report. Congress, with an over-all view of transportation, and with the aid of its Committees, makes and changes laws regulating public carriers. It has demonstrated conclusively that where it has interposed no specific limita-

tions in a regulatory statute none are to be implied. It has likewise demonstrated that where specific limitations are to be placed upon a regulatory statute, such as appellants contend for, Congress will exercise that purely legislative function.

4.

ANSWER TO THE BRIEF OF THE UNITED STATES

In the District Court the United States supported the Commission's order, hence the United States is not entitled to judicial review of the order. The United States repudiates the only question presented by appellants. The United States asserts a "question presented" but fails to undertake the burden of establishing it that would be required of one qualified to present it.

In the District Court the United States supported the Commission's order by answer setting out in extensive detail that the order is valid (R. 42-44). The United States filed a joint brief with the Commission in support of the order, and counsel for the United States made a separate oral argument in District Court in support of the order. The District Court entered a judgment that accorded with these requests of the United States.

Hence the United States is not "entitled to judicial review" of the Commission's order, since it is not a person "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute." Administrative Procedure Act § 10(a), 5 U.S.C. § 1009(a). *Lee* v. *Civil Aeronautics Board*, C.A.D.C. Cir., 225 F. 2d 950, 951 (1955); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955). Section 10(a) determines the right to review. *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line Railroad Co.*, 353 U.S. 436 (1957); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950).

The United States says, p. 10, "this brief * * * supports the appellants." That is not a correct statement. The United States expressly disagrees with and repudiates, p. 13, the sole ground of appeal asserted by appellants, that the Commission may not take existing railroad service into account in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service.

The United States says, p. 2, that the "question presented" is whether the Interstate Commerce Commission erred "in rejecting Schaffer's application for authority to provide *a motor service superior to the rail service* which alone was available to shippers * * *." (Emphasis added.)

But no one has attempted to establish that "the whole record" shows that Schaffer proposes to furnish "superior service." That contention calls up for consideration "the whole record" before the Commission together with the entire range of the Commission's administrative judgment in dealing with "the whole record." All of that must be considered before it is possible to reach the question whether the motor carrier service proposed is a "superior service." Administrative Procedure Act § 10(e), 5 U.S.C. § 1009(e); *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488 (1951).

And there are two obvious faults in that contention:

(1) It was not made a ground of appeal (R. 371), and it is not stated as a "question presented" by any appellant.

(2) Even if the United States were qualified to assert this contention, it has made no attempt to do so; there is nothing in its brief that brings its contention within the "where presented" phrase of § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e). This phrase confines review of administrative orders to questions duly "pre-

sented" as required by the Act and by proper appellate practice. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955). The brief of the United States does not attempt to show that its contention is supported by the "whole record," or that the Commission's order is not supported by the "whole record," within the meaning of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488 (1951). The burden to make that showing is on one asserting it. *North Whittier Heights Citrus Assn.* v. *Natl. Labor Rel. Bd.*, C.A. 9 Cir., 109 F. 2d 76, 83 (1940), cert. den. 310 U.S. 632; *Steelco Stainless Steel* v. *Federal Trade Comm.*, C.A. 7 Cir., 187 F. 2d 693, 695 (1951); *Mangum Electric Co.* v. *Russell*, 263 U.S. 675 (1923):

> "The court declines, in the absence of a brief, to examine a lengthy record to determine whether the evidence contained therein overcomes the presumption attaching to the findings of the commission and two courts."

If it can be said that the United States can "confess error", or, to be precise, can confess what it conceives to be someone else's error, it is obvious that the right to "confess error" is not comprehended within and does not confer the right to the "judicial review", par. (a), of the "whole record", par. (e), of § 10 of the Administrative Procedure Act. One who "confesses error" is plainly not within the description of par. (a). A "confession of error" could not conceivably comprehend sustaining the burden described in the preceding paragraph.

But in any event the United States does not undertake that burden. The United States makes, pp. 14-15, a few fragmentary references to the record but these are so fragmentary and so uprooted and isolated from context that they prove, upon brief examination, to defeat the purpose for which they apparently were cited. We will

make that brief examination, solely for the purpose of showing how far short the United States falls in its attempt to support a contention that in any event is not before the Court. We will call attention very briefly to record not disclosed in the U.S. brief which is an integral part of matter referred to in the U.S. brief. The record not disclosed in the U.S. brief would have to be considered by the Commission in determining public convenience and necessity and by the Court in deciding the issue which the U. S. brief attempts to present, but the United States, though having the burden of full presentation, has not attempted to carry it.

The St. Paul, Minn., dealer referred to in the U. S. brief, p. 14, whose less-carload shipments from Vermont to St. Paul take from "3½ to 6 weeks," actually would make little use of the proposed motor carrier service if it were instituted. He receives a "very large share" of his Vermont granite in rail carload lots and he would continue to do so if the proposed service were approved (R. 75). He had one less-carload shipment between January 1 and June 13, 1952 (R. 51; 76) and thought he might use the proposed service "perhaps half a dozen times per year." He is "one of the larger dealers" in the St. Paul area (R. 76).

The Rockford, Ill. dealer referred to in the U. S. brief, p. 14, whose shipments are all less-carload, left the record wholly in doubt as to how much, if any, of his Vermont granite would be carried by Schaffer if the application were granted (R. 176-177). His only *definite* testimony is that at least part of his Vermont granite would continue to move by rail; how much, if any, of his traffic would move by truck is left wholly indefinite (R. 177). He likes to be able to pick up granite at the railroad station at his convenience any time of the day, and he receives an allowance for making the pick-up where the tariff permits (R. 176-177). This convenience is illustrated by the objection of another monu-

ment dealer to inconvenient delivery time by a motor carrier: "I have to get out on the truck in the middle of the night and help them unload their granite." (R. 156). This monument dealer is not mentioned in the U. S. brief.

The Aberdeen, S.D., dealer referred to in the U. S. brief, p. 14, does not want speedy service. He handles 20,000 to 30,000 pounds of Vermont granite per year. He would let his orders accumulate to 10,000 pounds and then arrange truck service for it (R. 168). He expressly repudiated any desire for delivery of each order as it came along (R. 167-168).

The "Vermont manufacturer who ships annually 1,600,000 pounds into the 16 western states covered by Schaffer's application," referred to in the U. S. brief, p. 15, testified that "a dealer, if he possibly can, will instruct us to hold the shipment until it can get into a pool car because of the rate" (R. 240). He testified that the average delivery time of his rail less-carload shipments from Vermont to the involved Midwest points was "from one week to a good two weeks. In some instances, more" (R. 228-229). The manufacturer's rail less-carload shipments to the sixteen involved states (those between and including Illinois, Texas, and Montana, R. 297) are a yearly total of 600,000 pounds, an average of 3,000 pounds per day (R. 232). It is obvious that Schaffer could not dispatch a truck every day to one or more destinations in those sixteen states with but 3,000 pounds pay load. The witness, while admitting he did not know, speculated that Schaffer would accumulate loads and make weekly trips to various areas (R. 236). That would make his delivery time approximate the present rail less-carload delivery time.

The testimony of the field representative of the association representing 67 Vermont manufacturers referred to in the U. S. brief, p. 15, was held to be hearsay and inadmissible by Division 5 of the Commission "insofar as it related

to any need that the 18 members may have for the proposed operation" (R. 20).

All of the foregoing record, not mentioned in the U. S. brief, was a part of the whole record, also not mentioned in the U. S. brief, on which the Commission within the permissible range of its administrative discretion could determine that the proposed service was not required by public convenience and necessity.

We have discussed briefly the only specific record items referred to in the U. S. brief, solely for the purpose of showing how fragmentary is its presentation of the question it says is presented. Even if the United States were qualified to assert this contention as a ground for reversal, it has not even made a start toward carrying the required burden of submitting the question to the Court.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

"Public Convenience and Necessity" Clauses of Various Statutes.

Railroads

Act of Feb. 28, 1920, 41 Stat. 477, 49 U.S.C. § 1(18). No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *

Radio

Act of June 19, 1934, 48 Stat. 1083, 47 U.S.C. § 307 (a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

Telegraph and Telephone

Act of June 19, 1934, 48 Stat. 1075, 47 U.S.C. § 214 (a). No carrier shall undertake the construction of a new line

or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: * * *

AIR CARRIERS

Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. § 481 (d)(1). The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

WATER CARRIERS

Act of Sept. 18, 1940, 54 Stat. 941, 49 U.S.C. § 909 (c). Subject to section 910 of this title, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity, otherwise such application shall be denied.